

Appeal of: :
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DUNGAREE REALTY, INC., : HUDBCA No. 95-G-102-C1
: :
Appellant :
: :

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10 Topaz Court
Montebello (Suffern), NY 10901

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RULING ON GOVERNMENT'S MOTION TO DISMISS AND/OR
MOTION FOR SUMMARY JUDGMENT
August 12, 1997

Background

On May 4, 1987, Dungaree Realty, Inc. (Dungaree or Appellant) was awarded Contract No. 101-87-008 by the United States Department of Housing and Urban Development (HUD, Department, or Government). Under the contract, Dungaree was to serve as an Area Management Broker (AMB) and, in that capacity, was required to perform maintenance services on single family properties acquired by HUD within a specific geographic area. Section H, Article IV, paragraph (g) of the contract contained the following provision:

The Contractor shall not . . . [b]e employed or provide services to third party entities having responsibilities to HUD in connection with any properties financed under any program of HUD mortgage insurance unless the contract [sic] has notified the Contracting Officer of much [sic] proposed employment or service and has received written approval to perform such services or employment.

By letter dated January 27, 1988, Dungaree requested general approval from HUD to perform unspecified third party services. By letter dated February 11, 1988, the contracting officer denied Dungaree's request, stating that an AMB, such as Dungaree, should devote full time and attention to managing its HUD-owned properties.

On December 5, 1991, Dungaree filed a complaint with the United States Claims Court (Claims Court), now the United States Court of Federal Claims, alleging that the contracting officer incorrectly interpreted the contract clause and wrongfully denied Dungaree the opportunity to earn additional profits by managing third party properties. Dungaree sought damages in the amount of \$1,500,000 for the alleged bad faith actions of HUD's contracting officer. The Government filed a Motion to Dismiss the complaint for lack of jurisdiction, stating that: (1) Dungaree failed to submit a claim to the contracting officer

as required by the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §605(a) (1988); (2) Dungaree failed to properly certify its claim under the CDA, 41 U.S.C. §605(c); (3) Dungaree's claim was barred by the CDA statute of limitations, 41 U.S.C. §609(a) (3); and (4) Dungaree's claim sounded in tort, and therefore, the court lacked jurisdiction to consider the claim. By Order dated January 5, 1993, the Government's Motion to Dismiss was granted "for the reasons stated in defendant's April 3, 1992 motion to dismiss . . ." and Dungaree's claim was dismissed by the Claims Court without prejudice. United States Claims Court Order dated January 5, 1993, Dungaree Realty, Inc. v. United States, Claims Court No. 91-1667C (January 5, 1993).

By letter dated February 18, 1993, Dungaree submitted a request to the HUD contracting officer for a final contracting officer's decision on the issues raised in a May 20, 1992 letter sent by Dungaree to the contracting officer. The contracting officer responded on April 22, 1993, stating that the May 20, 1992 letter referred to and asserted the same claims set forth in Dungaree's January 27, 1988 letter. Since the January 27, 1988 letter was the subject of litigation which had not yet been concluded, the contracting officer declined to issue a final decision on the issues raised by Appellant in either its May 20, 1992 or February 18, 1993 letter, pending the outcome of the litigation.

Dungaree appealed the decision of the Claims Court to the United States Court of Appeals for the Federal Circuit (CAFC or Federal Circuit) . On appeal, Dungaree's sole contention was that the Claims Court decision could not be sustained since Dungaree's case arose under the contract and did not sound in tort. On January 18, 1994, the CAFC affirmed the decision of the Claims Court, holding that Dungaree had waived appeal of the single issue raised because Dungaree had failed to provide any reasoning or analysis of its position. The CAFC further held that even if Dungaree had not waived the one issue appealed, it would still be required to affirm the Claims Court decision because Dungaree had not appealed the other grounds upon which the Claims Court judgment was based. Dungaree Realty, Inc., v. United States, 30 F.3d 122 (Fed. Cir. 1994).

Dungaree filed a notice of appeal with the HUD Board of Contract Appeals (Board or HUD BCA) on October 18, 1994. Referencing the contracting officer's April 22, 1993 correspondence, Dungaree construed that letter as a failure to render a final contracting officer's decision. By Order dated March 3, 1995, the Board ordered the contracting officer to issue a final written decision on Dungaree's May 20, 1992 claim and stayed the proceedings pending issuance of the final decision. The contracting officer issued a final decision on April 12, 1995, denying Dungaree's claim.

By letter dated May 15, 1995, Dungaree appealed the denial of its claim by the contracting officer. On July 7, 1995, the Government filed a motion to dismiss and/or motion for summary judgment. The Government contends that the Board is collaterally estopped from exercising subject matter jurisdiction over Appellant's claim; that Appellant's claim sounds in tort and is therefore outside the Board's jurisdiction; and that Appellant's claim should be dismissed because Appellant's claim for anticipatory profits fails to state a claim for which relief can be granted. In response to the Government's contentions, Dungaree asserts that collateral estoppel is not appropriate in this case and that further discovery is necessary. Dungaree contends that although the alleged breach of the contract may involve tort, it does not preclude jurisdiction under the contract. Appellant also asserts that it is entitled to recover traditional contract breach damages, including anticipatory profits.

Discussion

Collateral Estoppel

The doctrine of collateral estoppel bars parties to a prior lawsuit from relitigating any issues that were actually and necessarily determined by a court of competent jurisdiction in the prior lawsuit. Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 362 n. 5 (1979); Arkla, Inc. v. United States, 37 F.3d 621,622 (Fed. Cir. 1994). The doctrine serves "the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." Parklane at 326. The Federal Circuit has set forth circumstances under which it has found collateral estoppel to be appropriate: (1) the issue to be decided is identical to one decided in the first action; (2) the issue was actually litigated in the first action; (3) resolution of the issue was essential to a final judgment in the first action; and (4) the parties had a full and fair opportunity to litigate the issue in the first action. Arkla, *supra* at 624; In re Jerre M. Freeman, 30 F. 3d 1459,1465 (Fed. Cir. 1994).

The requirement of identity of issues between the prior and present adjudication is plainly met. In the case litigated before the Claims Court, the Government argued that Dungaree's claim was barred because it sounded in tort rather than under the contract. This is the same issue which is now being raised in the present litigation and which the Government submits may not be relitigated under the doctrine of collateral estoppel. We find the identical issue of whether Dungaree's claim sounds in tort, present in the Claims Court litigation, to be present in the case pending before the Board.

The requirement that the issue was actually decided is generally satisfied if the parties to the original action disputed the issue and the trier of fact decided it. Jerre Freeman at 1465. Dungaree and the Government disputed and litigated the issue of whether Dungaree's claim sounded in tort. The Claims Court ruled in the Government's favor on that issue and the CAFC upheld the Claims Court decision. Thus, we conclude that the issue of whether Dungaree's claim sounded in tort was actually decided.

In order to give preclusive effect to a particular determination in a prior case, that determination must have been necessary to the judgment rendered in the previous action. Montana v. United States, 440 U.S. 147, 153 (1979). However, the requirement that a finding be "necessary" to a judgment does not mean that the finding must be so crucial that, without it, the judgment could not stand. Mother's Restaurant Inc., v. Mama's Pizza, Inc., 723 F.2d 1566, 1571 (Fed. Cir. 1983). Here, the Claims Court decision that it lacked jurisdiction was based upon all four alternative grounds for dismissal posited by the Government, including the argument that Dungaree's claim sounded in tort. Dungaree's appeal to the CAFC challenged only the Claims Court's determination that Dungaree's claim sounded in tort and the CAFC ultimately affirmed all four grounds upon which the Claims Court decision was made. A judgment based upon alternative grounds is an effective adjudication as to both and is collaterally conclusive as to both. Schellong v. I.N.S., 805 F.2d 655, 658 (7th Cir. 1986), *cert. den.*, 481 U.S. 1004 (1987). Since the Claims Court determination that Dungaree's claim sounded in tort was one of the grounds for the court's final decision, that determination was clearly essential to the final judgment.

Finally, in order to apply the doctrine of collateral estoppel, the party against whom the estoppel is being asserted must have been accorded a full and fair opportunity to litigate in the prior court proceeding the very issue he now

seeks to relitigate. Jerre Freeman at 1466. Dungaree does not contend that it did not have a full and fair opportunity to litigate the issue of whether its claim sounded in tort in the Claims Court proceedings and we have no reason to question the quality, extensiveness or fairness of the proceedings in Dungaree Realty, Inc. v. United States, Cl. Ct. No. 91-1667C. We therefore find, in the absence of any evidence to the contrary, that Dungaree was afforded a full and fair opportunity to litigate.

Since the matter before us meets the criteria established by the Federal Circuit for the appropriate application of collateral estoppel, we conclude that the Government is entitled to judgment as a matter of law on the ground of issue preclusion; that the Claims Court determination that Dungaree's claim sounds in tort is entitled to collateral estoppel effect; and that this Board is Collaterally estopped from exercising subject matter jurisdiction over Dungaree's claim.

Board Jurisdiction Over Tort Claims

The Board's jurisdiction arises under the CDA, 41 U.S.C. §§ 601-613. Under the provisions of the CDA, the Board has no jurisdiction over matters sounding purely in tort. Id. Federal agency boards of contract appeals are authorized to grant any relief that would be available to a litigant asserting a contract claim in the United States Claims Court (now the Court of Federal Claims). Asfaltos Panamenos, S.A., ASBCA No. 39425, 91-1 BCA ¶23,315. The Tucker Act, 28 U.S.C. §1491, confers jurisdiction upon the Court of Federal Claims to hear "any claim against the United States founded . . . upon any express or implied contract with the United States . . . in cases not sounding in tort. Id.; see also Descon Systems, Ltd., HUDBCA No. 74-2, 75-2 BCA.

Even if the doctrine of collateral estoppel did not preclude the Board from considering Dungaree's claim, the Board lacks subject matter jurisdiction under the CDA to entertain Dungaree's claim because it sounds in tort. Dungaree contends that it should be compensated for anticipatory profits from potential non-HUD contracts which Dungaree was not allowed to pursue because of the wrongful dictates of a HUD contracting officer. Such claims based upon alleged wrongful or intentional misrepresentation by Government employees and upon Government negligence sound in tort, and therefore, the Board has no jurisdiction to hear these cases. Alfred Bronder, ASBCA No. 29938, 86-3 BCA ¶19,102; Kasehagen Security Services, Inc., ASBCA No. 25629, 81-2 BCA ¶15,376; Jay Rucker, AGBCA Nos. 79-211A CDA, 79-211B CDA, 80-2 BCA ¶14,513. See also Joseph Hicks v. United States, 23 Cl. Ct. 647 (1991); Asfaltos Panamenos, S.A., supra.

Consequential Damages

The Government also seeks dismissal of Dungaree's claim for failure to state a claim upon which relief may be granted. In evaluating a motion to dismiss for failure to state a claim, it is presumed that all factual allegations in the complaint are true, and that all reasonable inferences are made in favor of Appellant as the non-moving party. Solar Turbines, Inc. v. United States, 16 Cl. Ct. 304, 316 (1989) (citing 2A J. Moore, J. Lucas & G. Grotheer, Jr., Moore's Federal Practice, para. 12.07 [.2-5] at 12-63 (2d ed. 1987)). The motion to dismiss should be granted only when it appears beyond a doubt that Appellant can prove no set of facts in support of its claim which would entitle it to relief. Id.

Even if we should accept as true Appellant's version of the facts, Dungaree has failed to state a claim upon which relief may be granted. Dungaree's complaint alleges a breach of contract and requests anticipatory profits from prospective third party contracts as damages for that breach. Damages are only recoverable where they are directly and proximately caused by the contract breach. Olin Jones Sand Co. v. United States, 225 Ct. Cl. 741, 742 (1980). As a matter of law, the damages claimed by Dungaree are too remote, speculative, and consequential in nature to permit recovery. Rocky Mountain Construction Co. and Stephen J. Kenney v. United States, 218 Ct. Cl. 665 (1978); William Green Construction Co. v. United States, 477 F.2d 930 (Ct. Cl. 1973); Ronal J. Rhen v. United States, 17 Cl. Ct. 140 (1989).

Conclusion

For the reasons set forth above, we conclude that this Board has no jurisdiction over this controversy and that Appellant has failed to state a claim upon which relief can be granted. The Government's motion to dismiss and/or motion for summary judgment is GRANTED. This appeal is dismissed with prejudice.

Lynn J. Bush
Administrative Judge

Concur:

David T. Anderson
Administrative Judge

Jean S. Cooper
Administrative Judge